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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KAREN MARTINEZ,

Defendant and Appellant.

F036258

(Super. Ct. No. 0625277-9)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Franklin P. Jones, Judge.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Louis M. Vasquez and Kathleen A. McGurty, Deputy Attorneys General, for Plaintiff and Respondent.

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Spray King Manufacturing employed appellant Karen Lynn Martinez as a bookkeeper from November 1995 through December 1997. In 1998 she was charged with one count of grand theft (Pen. Code, § 487, subd. (a)),[1] and one count of

[1] Unless specified, all further statutory references are to the Penal Code.

embezzlement (§ 504) for misappropriating Spray King's funds by: 1) paying herself unauthorized salary; 2) using a company check to pay her personal PG&E bill; and 3) using a company credit account to purchase supplies for her personal use. She was also charged with one count of attempted grand theft (§§ 664/487) and one count of attempted embezzlement (§§ 664/504) for attempting to pay her personal credit card bill with a company check. Appellant was further charged with misdemeanor petty theft (§ 488) for submitting a fraudulent expense report. A charge of theft through false pretenses was dismissed at trial.

A jury convicted appellant of both grand theft and embezzlement with respect to the unauthorized paychecks and the PG&E bill, and convicted her of the attempted grand theft and attempted embezzlement with respect to the personal credit card payment. The jury acquitted appellant of the grand theft and embezzlement charges relating to the credit account and of the misdemeanor theft charge arising from the expense reimbursement request.

Appellant was sentenced to a total of three years in prison, placed on probation for five years, and ordered to serve 360 days in the county jail. The court assessed section 1202.4, subdivision (b), restitution, and section 1202.45, parole revocation fines in the amount of $600. The court also ordered appellant to pay Spray King restitution in the amount of $8,003.51.

APPELLANT'S CONTENTIONS

Appellant contends that the trial court's instruction on section 511's good faith claim of title defense failed to set forth the burden of proof and thus violated her rights to due process. She claims the trial court erred in failing to give her requested instruction that a good faith belief in consent to take was a valid defense to the theft charges. Appellant asserts that the trial court unlawfully imposed a parole restitution fine under section 1202.45, as her sentence did not include a period of parole. Finally, appellant alleges that the minute order and commitment should be amended to reflect the courts

verbal sentencing as to count 2 (embezzlement of salary). Respondent concedes this last point.

We order that the minute order and commitment be amended to reflect that count two is stayed pursuant to section 654, but reject the remainder of appellant's arguments.

FACTS

Spray King Manufacturing, Inc., is a small company that makes machines used to add texture to drywall and other surfaces. Arlene Key, Spray King's Vice President, hired appellant as a bookkeeper in November 1995. Key thought appellant was an exceptional employee. Appellant was made a signatory on the Spray King checking account in February or March of 1997.

Appellant's duties included preparation of invoices and bills of lading, filing, managing account receivables and accounts payables, and maintaining bookkeeping journal entries. Another of appellant's duties was the preparation of worksheets for the outside company, Payroll People. Appellant entered the names of all employees, their hours, wages and deductions on the worksheet, and verbally reported this information when Payroll People called each Friday morning.[2] Payroll People used this information to prepare Spray King's payroll checks, and generated a payroll journal which reported the employee's names, hours, wages, deductions, taxes, gross pay, net pay, and check number issued.

Appellant, Key, and Don Presson, Spray King's founding president, were the only salaried employees during the time appellant worked at Spray King. Salaried employees were paid only twice a month, while the hourly employees were paid weekly. The payroll worksheet entries for salaried employees were to be marked "skip" or "no pay" on

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[2] The actual worksheets were not sent to Payroll People.

the weeks salaried employees were not paid, or with 1/2 the employee's monthly salary if they were paid that period.

Although Key initially reviewed the payroll worksheet two or three Fridays a month, she did so less frequently as appellant's employment continued. Key also "reconciled the books" by periodically comparing the cancelled checks to the payroll journals and checking off the checks that had cleared. She did not look at the payees.

A. *Unauthorized Payroll Checks*

Key first discovered unauthorized payroll checks when balancing the Spray King checking account in December 1997. Earlier in the month, appellant told her that Payroll People mistakenly issued her an extra payroll check. The payroll worksheet for that period showed a "skip" for all salaried employees, including appellant. Appellant should have informed Payroll People of the mistake and have the check voided. Appellant wrote "check issued in error, need Payroll People to amend" and "void" in the Payroll People's journal entry for that check, but Key was unable to find the voided check in the office. Key ultimately discovered the supposedly voided check was cashed through an ATM. A copy of that check revealed that the "void" notation had been "scribbled out."

When Key asked appellant about the check, she told Key it was with the other voided checks. Appellant later gave Key a check with a different number and date, which had the notations "instead of other one, Amy at PP" and "voided wrong one." Her suspicions raised, Key reviewed the payroll journals and found 11 instances where appellant had received checks in addition to those issued on her regular paydays. The extra checks were always in the amount of $900 (one half of appellant's monthly salary), less deductions.[3]

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[3] Appellant received $666.38 on April 18, 1997; $752.26 on May 2nd; $652.26 on August 1st; $754.26 on August 8th; $754.26 on August 22nd; $754.26 on September

The notation "skip" was written by the names of the three salaried employees in appellant's handwriting on 10 of the payroll worksheets on the unauthorized pay dates. The remaining worksheet indicates that all salaried employees were to be paid, and Presson and Key were also paid on that date. Both Key and Presson testified unequivocally that appellant was not authorized to receive more than two paychecks each month.

Appellant denied she wrote "Skip" on the worksheets for the weeks she received additional checks, because she only wrote a printed, not cursive, "S" on the worksheets. She implied the handwriting was Key's.

Appellant also testified the "extra" paychecks were all for overtime authorized by Presson on July 9, 1997. He told her to pay herself either through an extra paycheck every week or by giving him cash receipts. She was to continue this practice until Presson advised her to stop. Amanda Cummings, appellant's daughter (who worked at Spray King during school breaks in 1996 and 1997), claimed to have overheard this conversation. Presson flatly denied it occurred.

Appellant attributed her need to work extensive overtime to Spray King's purchase of a computer in February of 1997. She testified that in March of 1997 she studied the new system, installed the initial programs, and "investigated" whether the original software could also do invoices and billing. Key ultimately selected a different program and wanted all of the data from the prior year entered into the new system. The data entry was extremely time consuming, and the computer "crashed" destroying all the data on two different occasions.

19th; $752.26 on October 3rd; $754.26 on October 17th; $754.26 on November 7th; $754.26 on November 21st; and $754.26 on December 5, 1997.

However, Key testified that the accounting software was not purchased until June or July of 1997. She hired her friend Shelly Lovelace, a self-employed computer consultant, to install the program, enter data and get it up and running. Appellant acknowledged that Lovelace was brought in to set up the computer, but appellant found her work on the Spray King account unintelligible, and assumed responsibility for the computer accounting system. Key and Lovelace testified that Lovelace did the computer accounting; Key asserted appellant was never instructed to do anything with the computer.

Appellant claimed that Key and Presson both told her to work overtime to enter data and perform her regular duties. Cummings asserted she was present for "a lot" of these conversations. Appellant testified she worked at least three hours of overtime a day in April and May. Appellant maintained she was working 12 hours a day and every weekend by June. She worked through lunch, came in early, stayed late and brought work home. Cummings agreed. Robert Thompson, a Spray King welder, also testified that he saw appellant at her desk, apparently working, on weekends, during lunch and after 5:00 p.m.

Appellant reduced her hours in November, after the accounting became current. She estimated she worked in excess of 1,000 hours of overtime. Both Key and Presson denied ever authorizing any overtime, or even being aware that appellant was working overtime.

Key testified appellant's hours were 8:00 a.m. to 5:00 p.m. Key typically left the office around 6:00 p.m. and the few times Key saw appellant at work after 5:00 p.m., appellant was socializing, not working. Furthermore, Key was actually living in the Spray King office from April 11, 1997, through the last week of June 1997. She slept in the room where the computer was located and never saw appellant work after hours or on weekends.

Key and Presson confronted appellant about the extra paychecks on the morning of December 16, 1997. Appellant first claimed that she hadn't done anything wrong, Payroll People made a mistake. She had no answer when asked why she cashed the checks, and did not mention overtime. However, she volunteered to work without pay and asked if Presson was going to call the police.

Appellant testified the December 16, 1997, argument arose from the fact that she reported Spray King to the Board of Equalization for tax fraud in November 1997, and was copying documents that supported her claims during her usual work hours. Appellant claimed that no one objected to her overtime checks prior to that day. Appellant denied saying extra checks were due to Payroll People's mistake or that she would work for free to pay it back. She maintained Key and Presson told her that she could keep her job if she worked for half wages.

Robert Gottselig, a Fresno County District Attorney Senior Investigator for worker's compensation fraud cases, testified appellant made a complaint against Spray King and gave him documents raising implications of premium fraud in December 1997 or January of 1998. Although he believed that Spray King's conduct may have been criminal, he was unable to obtain sufficient information for a search warrant and complete his investigation. No charges were ever brought, and he never informed Spray King of his investigation.

Appellant maintained that all the checks she wrote to herself were authorized and that Presson and Key knew she was taking the extra checks, because they argued about her wages during the summer of 1997. Appellant denied trying to conceal the payments to herself or those made on her behalf, as all of the checks she wrote were logged in the check register. Furthermore, appellant observed that Key occasionally prepared the payroll worksheets.

Appellant finished her usual workday on the 16th, but she faxed her resignation the next day and never returned to Spray King.

B. ***Use of Company Funds to Pay Personal Utilities***

In January 1998, PG&E attempted to shut off Spray King's electricity for lack of payment. The Spray King check register indicated that appellant had signed a $891.74 check to PG&E on November 25, 1997, and another in an identical amount on December 8. However, Spray King's December bill was more than $891.74.

Joseph Trembley, a supervisor from PG&E, testified that the December 8, 1997, Spray King's check was applied to appellant's home account. He further testified that the check could only have been credited against appellant's personal account if it was mailed with appellant's payment coupon. Neither Presson nor Key authorized appellant to pay her personal PG&E bill with a Spray King check.

Appellant had no explanation how the Spray King check was credited to her account, although she sometimes paid her personal bills at her desk at work while she was on break. She had never had a PG&E bill that high because she was on a level payment plan of $195 per month with PG&E.

C. ***Attempted Use of Company Funds to Pay a Personal Debt***

Key also discovered that appellant had signed a $1,500 December 10, 1997, check made out to "Providian" which neither she nor Presson had authorized. Key stopped payment on the check because she did not recognize the name of the payor as one of Spray King's vendors.

Appellant opened a personal Providian credit card account in November 1997. Crystal Speaks, a Senior Fraud Investigations Manager, testified Spray King's $1,500 payment on appellant's account was reversed in December 1997, leaving a balance due of over $1,600.

Appellant testified Presson told her to write the $1,500 check to Providian as her Christmas bonus. Presson denied giving appellant a Christmas bonus in 1997 (they were paid after she left the company), and/or authorizing her to pay her personal credit card with Spray King funds. The highest bonus given in 1997 was $500.

D. ***Improper Reimbursement Request***

Appellant was allowed reimbursement for certain expenses, including gas for company errands. However, Presson and Key testified that a $343.48 August 21, 1997, reimbursement check signed by appellant was not authorized, because the receipts were not initialed and included inappropriate expenses.

Appellant stated that Presson authorized her $343.48 expense reimbursement check and that she had accrued these expenses running errands for the company or had been specifically authorized to make these purchases.

E. ***Unauthorized Use of Company Credit***

After appellant's departure, Key found an Office Depot file containing several bills and a credit application filed out by appellant. Key and Presson maintained that Spray King did not have an Office Depot account, and that they did not authorize opening one. Key stated that appellant was not responsible for purchasing office supplies, yet appellant signed three checks made out to Office Depot, ($182.74 on May 8, 1997, $147.95 on October 10, and $138.69 on November 10), and also reimbursed Spray King for a $156.71 purchase with her personal credit card. The receipts indicated the purchases included art supplies that Key never saw and that the company would never use.

Brent Fishel, a store manager for Office Depot, testified that an existing, but inactive Spray King account, was activated by an application signed by appellant. Three cards were issued on the account. The manager was unable to determine who made or authorized the purchases. An October 11, 1997, invoice from Spray King bore the name "Arleen," and appeared to be for the purchase of a cartridge for the office printer.

Appellant maintained that Presson told her to open an Office Depot account in the spring of 1997. They received three credit cards for the account, which she placed in the file. She occasionally used one of the cards to purchase supplies for work at the direction of Presson or Key, but returned the card to the file when done with it. She used the

account once for her own personal use, but was told she could reimburse the company, which she did by making a payment to Spray King with her Providian card.

Cummings testified that her first assignment was an Easter poster for Key which she prepared using art supplies taken from Office Depot bags removed from Key's automobile. Key testified that Cummings used items from the shop. Cummings claimed to have accompanied Key to Office Depot where she saw Key make purchases with an Office Depot credit card.

THE JURY INSTRUCTIONS ACCURATELY SET FORTH THE GOOD FAITH CLAIM OF TITLE DEFENSE

A. *Nature of the Charges Against Appellant*

Common law recognized three kinds of nonforcible appropriation of another's property: (a) larceny, a crime involving a trespassory violation of possession; (b) embezzlement, the appropriation by a fiduciary in lawful possession; and (c) obtaining title to property by false pretenses. (2 Witkin, Cal. Criminal Law (3d ed., 2000) Crimes §1, citing *People v. Ortega* (1998) 19 Cal.4th 686, 696.) Appellant was charged with theft (larceny) and embezzlement. California abolished the procedural distinctions between these crimes in 1927 in enacting section 484, which presently provides:

> "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft." (§ 484, subd. (a).)

Nevertheless, this consolidation did not create new crimes or enlarge the scope of any of the three old ones. Hence, the prosecution had to prove all the substantive elements of

both theft and embezzlement. (2 Witkin & Epstein, Cal. Criminal Law, *supra*, Crimes Against Property, § 3.)

Larceny is the taking of personal property of some value from another with the specific intent to permanently deprive the victim of his or her property, coupled with a carrying away of the property by obtaining physical possession and control of the property for some period of time and by some movement of the property. (CALJIC No. 14.02.)

Embezzlement requires the existence of a relationship of trust and confidence between two people, pursuant to which one accepts property entrusted to him or her by the other, and then converts or appropriates such property to his or her own use with the specific intent to deprive the other person of the entrusted property. (CALJIC No. 14.07.)

Obviously, a person cannot steal or embezzle his own property, and "the prosecution will necessarily fail unless the proof shows that the defendant appropriated the property of another person." (2 Witkin & Epstein, Cal. Criminal Law, *supra*, Crimes Against Property, §§ 24, 32.) "Thus, a bona fide claim of ownership or right of possession, whether based on mistake of fact or law, is a defense" to larceny. (*Id*. at § 24.) Section 511 provides a similar defense to embezzlement:

> "CLAIM OF TITLE A GROUND OF DEFENSE. Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him."

Appellant's defense at trial was based on the theory that she believed she was authorized to issue each of the disputed checks and to make each of the disputed charges. Accordingly, she contends the prosecution could not prove that she had the specific intent to deprive Spray King of its property.

B. *Jury Instructions Proposed and Given*

Appellant proposed the following instruction on her claim of right defense:

> "The defendant's honest belief, even if mistakenly held, that [he] [she] had a right or claim to the property taken negates the felonious intent necessary to convict [him] [her] of [robbery] [or] theft.
>
> "The defendant need not show the claim of right was reasonable. An unreasonable belief that [he] [she] had a legal right to take the property will suffice so long as the claim was made in good faith.
>
> "If the evidence raises a reasonable doubt as to whether defendant acted under a bona fide belief in a right or claim to the property you must find that defendant did not form the necessary felonious intent."

The trial court declined to give appellant's proposed instruction and instead instructed the jury as follows:

> "In the crimes of embezzlement, grand theft, and petty theft of which the defendant is accused in Counts 1, 2, 5, 6, 8, 9, and 10, a necessary element is the existence in the mind of the defendant of the specific intent to fraudulently deprive Spray King Manufacturing, Inc. of its property.
>
> "If the evidence shows that the defendant took the property of Spray King Manufacturing, Inc. openly and avowedly and under a good faith claim of title, even though such claim is untenable, you must find that the defendant lacked the specific intent required in Counts 1, 2, 5, 6, 8, 9, and 10.
>
> "If the evidence shows that the taking was open and avowed, such evidence can be used to show that defendant had a good faith claim of title to the property taken. If the evidence shows that the defendant concealed the taking of the property of Spray King Manufacturing, Inc., either before or after the actual taking, the defense of a good faith claim of title to the property is not available to defendant. Whether defendant's claim of title to the property taken from Spray King Manufacturing, Inc. is made in good faith should be evaluated in light of all credible evidence produced.
>
> "If the evidence shows that the defendant did not have a good faith claim of title to the property taken from Spray King Manufacturing, Inc., defendant's claim of title should not be used to negate the specific intent required in Counts 1, 2, 5, 6, 8, 9, and 10."

Appellant states her good faith claim of title or right to defense is based on section 511. The jury instructions given in this matter accurately reflect the language of that section. The jury was advised that if "the evidence shows that defendant took the property of Spray King Manufacturing, Inc. openly and avowedly under a good faith claim of title, even though such claim is untenable, you must find that the defendant lacked the specific intent required" to commit the crime of embezzlement. The jury was therefore instructed with all of the elements of section 511.

It appears that appellant's only objection to the instruction given by the court is that it fails to explicitly state the burden of proof, i.e., that the prosecution bore the burden of proving that she intended to deprive Spray King of its property, and that she need only raise a reasonable doubt as to whether she had a good faith belief in her claim of title. Respondent concedes that claim of right or title defense is not a true affirmative defense, as it merely obligates appellant to negate an element of the charged crimes. However, respondent asserts that the instructions given properly placed the burden of proof on the prosecution. Thus, no error occurred.

We agree with respondent.

C. *The Jury Could not have Concluded Appellant Bore Burden Of Proof Relative to Her Claim of Right Defense.*

We evaluate claims of instructional error "'in the context of the overall charge'" to the jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 824; quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 146-147.) The challenged instruction explicitly states that "the specific intent to fraudulently deprive Spray King Manufacturing, Inc. of its property" is an element of the crimes of theft and embezzlement. The jury was properly instructed with CALJIC No. 2.90, which provided that appellant was presumed innocent until proven guilty and that the prosecution bore the burden of proving appellant's guilt of the charged crimes by proof beyond a reasonable doubt.

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (§ 1093, subd. (f); *People v. Wilson* (1967) 66 Cal.2d 749, 764 [59 Cal.Rptr. 156, 427 P.2d 820]; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 607, pp. 866-867.) However, a trial court may refuse to give a duplicative instruction. (*People v. Noguera* (1992) 4 Cal.4th 599, 648.)

Finally, the trial court did not err in instructing the jury that the issue of whether appellant's "claim of title to the property taken from Spray King Manufacturing, Inc. is made in good faith should be evaluated in light of all credible evidence produced." Nothing in this statement implicates, let alone varies, the burden of proof. It accurately states the law, essentially summarizing the substance of CALJIC Nos. 1.00 (jury must determine what facts have been proved by the evidence), 2.00, 2.01, 2.02, 2.03, 2.13, 2.21.1, 2.21.2, 2.22, 2.27 (all relating to the evaluation of testimony) and 2.20 (jury is sole judge of believability of witnesses.)

Nothing in the jury instructions suggests appellant had the burden of proof on any issue. We assume that the jury understood and followed the jury instructions given to them. (See *People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

This case is therefore distinguishable from *Cage v. Louisiana* (1990) 498 U.S. 39 and *Sullivan v. Louisiana* (1993) 508 U.S. 275 wherein the juries were admittedly given incorrect definitions of "reasonable doubt" and the Supreme Court concluded that misconstruction as to the burden of proof vitiates all of a jury's findings. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 282-283.) Appellant's jury was not misinstructed on any issue of law.

THE TRIAL COURT WAS NOT OBLIGATED TO INSTRUCT THE JURY THAT A GOOD FAITH BELIEF IN CONSENT TO TAKE PROPERTY IS A DEFENSE TO THEFT CHARGES

Appellant contends that the jury should have been given her proposed instructions on the defense of a good faith belief in consent to take property, which read as follows:

> "If one takes the property of another with the good faith belief that she has the permission to take the property, she is not guilty of theft. This is the case even if the good faith belief is unreasonable. The defendant must prove beyond a reasonable doubt that the defendant did not so believe for you to convict the defendant of theft."
>
> "Larceny is not committed if the property was taken with the owner's consent unless such consent was obtained by fraud."

As set forth above, appellant's jury was instructed that the prosecution was required to prove, beyond a reasonable doubt, that appellant specifically intended to take Spray King's funds with the specific intent of depriving Spray King of its money. (CALJIC Nos. 1.00, 2.90, 14.02.)) Accordingly, the prosecution necessarily had to counter appellant's charge that she believed Spray King consented to her appropriation of the funds. There was no instruction error on this issue.

THE TRIAL COURT PROPERLY IMPOSED A PAROLE RESTITUTION FINE PURSUANT TO SECTION 1202.45

Appellant was sentenced to two years in prison for the theft charges relating to the paychecks and two years, stayed, on the embezzlement charge on the same matter. Appellant was sentenced to eight months in prison for the theft relating to the PG&E bill with an additional eight months for the embezzlement stayed. Appellant was also sentenced to a four-month term for the attempted theft of the credit card payment, an additional four months for the attempted embezzlement of the funds was stayed. The prison terms were to be served consecutively. Appellant was placed on probation for five years, and ordered to serve 360 days in county jail, but was allowed to apply for the work furlough program. Appellant was further ordered to perform 240 hours of community

service. The court assessed section 1202.4, subdivision (b) restitution and section 1202.45 parole revocation fines at $600 each. The court also ordered appellant to pay Spray King restitution in the amount of $8,903.51. Appellant's sentence does not explicitly address parole.

Appellant contends that the trial court erred in imposing a $600 parole restitution fine pursuant to section 1202.45 because her sentence did not "include a period of parole." Respondent counters that parole is implicit in appellant's sentence in that she will be eligible for parole if she violates the terms of her probation and is sent to prison.

Section 1202.45 provides:

> "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount. ... This additional restitution fine shall be suspended unless the person's parole is revoked."

The two published cases interpreting the issue of whether a defendant's sentence "includes a period of parole" when the prison term is suspended reach different conclusions.

In *People v. Hannah* (1999) 73 Cal.App.4th 270 (*Hannah*), the defendant was given a five year prison sentence, suspended, and five years of probation. The trial court imposed a parole restitution fine pursuant to section 1202.45. The Fifth Division of the Second Appellate District reversed, finding it was inappropriate, in light of the commonsense interpretation of section 1202.45, to impose the fine when the defendant was not then subject to parole. (*Id*. at pp. 274-275.)

The Fifth Division of the First District Court of Appeal reached a contrary result in *People v. Tye* (2000) 83 Cal.App.4th 1398. The defendant in *Tye* was sentenced to four years in prison but the sentence was suspended and the defendant was placed on five years probation. The appellate court noted that the *Hannah* court relied upon an earlier decision in which the restitution fine under section 1202.45 was held not to apply to a

defendant sentenced to life in prison without possibility of parole, because "'the [defendant's] sentence does not presently allow for parole and there is no evidence it ever will.'" (*People v. Tye, supra,* 83 Cal.App.4th at p. 1401, citing *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185-1186.) However, the *Tye* court concluded a sentence includes the possibility of parole when a sentence is imposed, but its execution is suspended, because the defendant could violate probation, serve time in prison, be released on parole and then violate parole. Therefore the sentence "includes a period of parole." (*People v. Tye*, *supra*, 83 Cal.App.4th at p. 1401.)

We believe that *Tye* is better reasoned and reaches the correct result. A sentence which carries the possibility of parole is a sentence which "includes a period of parole" within the meaning of section 1202.45.

DISPOSITION

We affirm the judgment of conviction. The lower court is instructed to amend the June 13, 2000, minute order to reflect the sentence on Count 2 is stayed pursuant to section 654.

_____
Ardaiz, P.J.

WE CONCUR:

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Vartabedian, J.

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Cornell, J.